Supreme Court, U.S.
FILED

(1)

No. 96 505 SEP 30 1996

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IN THE

Supreme Court of the United States

October Term, 1996

GEORGE LINDEMANN, JR., *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CURCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a conviction under 18 U.S.C. § 1343 for making or causing an interstate communication to carry out a fraud is sustainable absent proof that the defendant could have foreseen the interstate nature of the communication.

2. Whether an appellate court may affirm a conviction on the basis of a legal standard different from the standard that the jury was instructed to apply.

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IN THE

Supreme Court of the United States

October Term, 1996

GEORGE LINDEMANN, JR., ***Petitioner,***

v.

UNITED STATES OF AMERICA, ***Respondent.***

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, George Lindemann, Jr., respectfully requests that a writ of certiorari be issued to review the judgment of the Court of Appeals for the Seventh Circuit entered June 4, 1996.

OPINION BELOW

The opinion of the Court of Appeals for the Seventh Circuit is reported at 85 F.3d 1232 and is reprinted in the appendix at A-1.

JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1). Petitioner seeks review of the decision of the Court of Appeals for the Seventh Circuit issued June 4, 1996. A Petition for Rehearing with Suggestion for Rehearing In Banc was timely filed on June 18, 1996, and denied on July 1, 1996. The order denying the Petition for Rehearing is reprinted in the appendix at A-24. This Petition is filed within 90 days of the denial of the Petition for Rehearing.

STATUTORY PROVISION INVOLVED

The federal wire fraud statute, 18 U.S.C. § 1343, provides, in relevant part:

> "Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such a scheme or artifice, shall be fined under this title or imprisoned not more than five years, or both."

STATEMENT OF THE CASE

In 1990, George Lindemann, Jr. ("Lindemann"), then 28 years old, was one of the top riders in the world and a likely member of the next U.S. Olympic Team in equestrian competition. Lindemann was a 20% stockholder in a family corporation that owned Cellular Farms, a horse farm in the State of New York that was in the business of training horses and riders for equestrian competition. He was the chief operating officer of the corporation and Marion Hulick was manager of the farm. Lindemann lived on the farm, as did Hulick and other farm employees.

In 1994, Lindemann and Hulick were indicted for wire fraud under 18 U.S.C. § 1343. The superseding indictment under which the case was tried charged in three counts that in 1990 Lindemann, Hulick, Barney Ward and Tom Burns (also known as Tim Ray) devised a scheme to defraud, pursuant to which Burns killed a horse named Charisma so that the proceeds of an insurance policy on the horse could be obtained.

Each of the three counts charged specifically that "for the purpose of executing the scheme," Lindemann, Hulick and Ward "knowingly did cause to be transmitted by means of wire com-

munication in interstate commerce ... a long distance telephone call...." There was no allegation of any telephone call by Lindemann or Hulick. The three calls alleged in the three counts, respectively, were a call from Ward in New York to Burns in Illinois, a return call from Burns to Ward, and a call by Burns in Illinois to a travel agency in New York.

The evidence presented by the Government at trial consisted principally of the testimony of Burns, a 30-year-old horse-farm roustabout who was arrested in February 1991 while breaking a horse's leg. Burns, who testified pursuant to a plea-bargain agreement, said he was solicited by Ward to kill Charisma, and named Hulick as the person who made the arrangements initially with Ward and later with him. He testified that Ward and Hulick made statements suggesting that Lindemann was involved in the scheme.

Throughout the period when the horse-killing scheme was allegedly implemented, Lindemann was traveling in the Far East. The Government made no claim that he ever communicated with Ward or Burns, and there was no evidence that he knew either Ward or Burns would be contacted by Hulick. Even under the Government's theory, Hulick dealt initially only with Ward, whose farm was located near Cellular Farms in the State of New York; there was no evidence that Hulick had any reason to believe that Burns or any other person from another state would be contacted.

The Government initially contended that Lindemann should be deemed to have caused the three interstate telephone calls alleged in the indictment because it was reasonably foreseeable to him that interstate telephone calls would be made.[1] Linde-

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1 The Government made no contention at trial that Lindemann was chargeable under the doctrine of vicarious liability with the acts or expectations of any other party to the case. Accordingly, the Court of Appeals held, no such argument was available to the Government on appeal. 85 F.3d at 1240 n. 6.

mann moved at the end of trial to dismiss on the ground that the evidence on the foreseeability issue was insufficient. The trial court denied the motion and submitted the case to the jury. However, the court did instruct the jury that a finding of foreseeability as to an interstate communication was essential to a conviction:

> "To sustain the charge of wire fraud, the government must prove the following propositions: First, that the defendant knowingly participated in the scheme to defraud as described in the indictment. Second, that for the purpose of carrying out the scheme, the defendant caused interstate wire communications to take place in the manner charged in the particular count. Third, that the defendant did so knowingly and with the intent to defraud.
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> * * *
>
> "The government must prove that interstate communication facilities were used to carry out the scheme. A defendant causes interstate communication facilities to be used when use of interstate communication facilities can reasonably be foreseen."

On appeal, Lindemann again raised the issue of the sufficiency of the evidence to show foreseeability of an interstate communication. Faced with the total absence of any evidence from which an inference of such foreseeability could properly be drawn, the Government changed its position. Contrary to the Government's position at trial and to the trial court's instruction to the jury, the Government's principal theory on appeal was that all it was obliged to prove in order to sustain a conviction under Section 1343 was that telephone calls *of some kind* were foreseeable; that proof of the foreseeability of an interstate communication was not required.

The Court of Appeals adopted the position advocated by the Government, holding that in order to establish guilt of causing an interstate telephone call to execute a fraud, the Government need not prove that an interstate telephone call was foreseeable.

Instead, it held, the Government need prove only that it was reasonably foreseeable to the defendant that a telephone call of some kind would be made, whether interstate or intrastate. 85 F.3d at 1240. The court went on to assert, without explanation or reference to the record, that telephone calls of some kind were foreseeable here. *Id.* at 1242.[2]

The record in this case contains absolutely no evidentiary basis for concluding that Lindemann had reason to foresee that *any* telephone calls — interstate or intrastate — would be made by anybody. On the issue of foreseeability, what the Court of Appeals has held *de facto*, therefore, is that in human affairs it may be presumed that telephones will be used, and that this presumption is a sufficient evidentiary basis on which to sustain a conviction under Section 1343 of the crime of causing an interstate communication to implement a fraud.

The trial court sentenced Lindemann to 33 months' imprisonment. He began serving his sentence on February 19, 1996, and remains incarcerated at the present time.

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2 The Court of Appeals commented that Lindemann "does not really dispute" its conclusion on this score. 85 F.3d at 1241. However, if counsel for Lindemann did not make clear that they disputed the foreseeability of intrastate telephone calls, the reason was that until the court made its astonishing interpretation of the statute, counsel were unaware that the foreseeability of intrastate calls was an issue in the case.

REASONS FOR GRANTING THE WRIT

I. The Writ Should Be Granted as to the Issue of Whether a Conviction under the Wire Fraud Statute (18 U.S.C. § 1343) Is Sustainable Absent Proof that the Defendant Made an Interstate Communication or Could Have Foreseen the Making of Such a Communication by Someone Else

A. There is a clear conflict among the Circuits on the issue presented

Certiorari should be granted to review the decision of the court below because that decision, while consistent with decisions in the Second and Eighth Circuits, is squarely in conflict with decisions on the same issue by the Courts of Appeals for the Third and Fifth Circuits.

The most recent conflicting decision by a Court of Appeals is *United States v. Brumley*, 59 F.3d 517 (5th Cir. 1995), *superseded on other grounds*, 79 F.3d 1430 (1996), in which the court reversed a conviction based on the receipt by Brumley of funds by interstate wire. The applicable legal principle, the court said, is that "[i]n order for a wire fraud conviction to stand ... it must be foreseeable to the defendant that his actions will result in an interstate wire communication." 59 F.3d at 520. The court expressly noted that its position in this regard was contrary to that of the Courts of Appeals for the Second and Eighth Circuits. After reviewing the evidence, the court concluded that there was not sufficient evidence in the record to enable a trier of fact to find the requisite foreseeability beyond a reasonable doubt. *Id.* at 522.[3]

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3 The *Brumley* court's opinion was superseded on rehearing by an opinion holding that Brumley's conviction was even more fundamentally defective in that the conduct charged was not proscribed by the statutes involved (18 U.S.C. §§ 1343 and 1346). There is, however, nothing in the second opinion that casts doubt on the court's position as to foreseeability, particularly in view of the

Similarly, in *United States v. Bentz*, 21 F.3d 37 (3d Cir. 1994), the Court of Appeals for the Third Circuit reversed a wire-fraud conviction based on checks generated by a computer in another state. There was, the court held, "no evidence" that the defendant knew or could have reasonably foreseen that interstate wire transmissions would be involved in what was on its face an intrastate transaction. *Id.* at 41.

Clearly, the Courts of Appeals of the United States have adopted sharply divergent views on the issue of what interstate aspects, if any, a case that would normally be a state-law fraud case must have in order to be prosecuted as a federal wire fraud case. Until its decision in this case, the Seventh Circuit appeared to agree with the Third and Fifth Circuits. *Cf. United States v. Soteras*, 770 F.2d 641, 645 (7th Cir. 1985). The Second and Eighth Circuits follow the rule adopted by the court below. *United States v. Blackmon*, 839 F.2d 900, 907-08 (2d Cir. 1988); *United States v. Bryant*, 766 F.2d 370, 375 (8th Cir. 1985), *cert. denied*, 474 U.S. 1054 (1986). Thus, the law applicable to a citizen charged with violation of the wire fraud statute — one of the most frequently used statutes in federal criminal jurisprudence — depends on the locale where the offense is committed or where the Department of Justice chooses to prosecute it.

From the standpoint of petitioner, the effect of this conflict is stark. Since his trial took place in Chicago, he is serving a

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large number of Fifth Circuit precedents cited by it and its express acknowledgment of a conflict with the Second and Eighth Circuits.

Other Fifth Circuit cases to the same effect, cited by the *Brumley* court at 520 n. 5, are *United States v. Duncan*, 919 F.2d 981, 991 (5th Cir. 1990), *cert. denied*, 500 U.S. 926 (1991); *United States v. Toney*, 598 F.2d 1349, 1355 (5th Cir. 1979), *cert. denied*, 444 U.S. 1033 (1980); *R.A.G.S. Couture, Inc. v. Hyatt*, 774 F.2d 1350, 1354 (5th Cir. 1985); *United States v. Snyder*, 505 F.2d 595, 601 (5th Cir. 1974); and *United States v. Shyrock*, 537 F.2d 207, 209 (5th Cir. 1976), *cert. denied*, 429 U.S. 1100 (1977).

sentence in a federal prison. If he had been tried in Philadelphia or Houston, he would be a free man. Arbitrary inconsistencies of this kind are among the considerations that caused this Court to provide in its Rule 10.1(a) that one of the "special and important" reasons for granting review on writ of certiorari is that a federal court of appeals "has rendered a decision in conflict with a decision of another United States court of appeals on the same matter."

B. The issue presented is an important issue of federalism that affects a large number of cases

The underlying offense alleged in this case — killing a horse to obtain insurance proceeds — is a grossly reprehensible offense. However, it would be difficult to imagine an offense having less relevance to the federal government or to the purposes for which it was established.

Because the killing of a horse would seem to be no more a proper subject of federal concern than the carrying of a gun near a school (*see United States v. Lopez*, ___ U.S. ___, 115 S. Ct. 1624 (1995)), we reserve the right to contend that the constitutional power to enact 18 U.S.C. § 1343, as construed and applied by the court below, is not to be found in the Commerce Clause or any other clause of the Constitution. However, our principal contention is the more limited one that, in the absence of clear textual compulsion, the policies underlying the federal system established by the Constitution dictate that a criminal statute should not be construed so as to minimize, to the point of disappearance, its relevance to federal concerns. *United States v. Bass*, 404 U.S. 336, 349-50 (1971). Unless the statutory text clearly so requires, a federal criminal statute in an area already occupied by state law should not be construed so as to extend its scope (a) to or beyond the outer limits of the constitutional powers available to Congress, *see Russell v. United States*, 471 U.S. 858, 860 (1985), or (b) to every imaginable instance of the

underlying state-law offense, leaving no area of exclusive state criminal jurisdiction. *United States v. Bass*, 404 U.S. at 349.[4]

As pointed out in Part C of this petition, *infra*, the text of 18 U.S.C. § 1343 does not reflect any effort on the part of Congress to extend the statute's scope to the ultimate reaches of congressional power; on the contrary, it seems to define as the crime itself the making or causing of an *interstate* communication. Nevertheless, the decision of the court below extends the statute's scope to or beyond the furthest reaches of the Commerce Clause. The court below holds, in effect, that any fraud which incidentally involves *any* interstate communication — even if not willfully caused or foreseeable by the defendant — is within the scope of the statute. From the cases that have already arisen under the statute, we know that in today's world of satellite telephone communications and computer-generated messages, virtually every transaction, no matter how local in appearance, involves incidentally some interstate communication. *See United States v. Bentz*, 21 F.3d at 38 (check issued in Pennsylvania was generated by a computer in another state); *United States v. Brumley*, 59 F.3d at 520-22 (wire transfer between Texans was sent by Western Union through another state). Under the decision of the court below, the element of willfulness is supplied by a presumption that any human activity foreseeably involves one or more uses of the telephone — and, despite the words of the statute, it matters not whether such phone calls are foreseeably interstate in character.

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4 "[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance. Congress has traditionally been reluctant to define as a federal crime conduct readily denounced as criminal by the States.... In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." 404 U.S. at 349. *See also United States v. Lopez*, 115 S. Ct. at 1631.

The potential impact of this interpretation of the statute on the division of cases between federal and state courts is enormous. It creates a situation where virtually every imaginable instance of fraud becomes a matter of federal cognizance which, if a federal prosecutor is so inclined, is prosecutable in a federal court. That a decision creating such a situation is "important" within the meaning of this Court's Rule 10 would seem to be self-evident.

Further, because the wire fraud statute is one of the most frequently used statutes in federal criminal prosecutions, the issue presented here is important in that it potentially affects a large number of cases.

C. The issue was wrongly decided by the court below

Petitioner appreciates that this Court's decisions as to whether to grant certiorari are not dependent on the merits of the decision to be reviewed. However, it cannot be completely irrelevant that the decision of the court below is an obviously wrong reading of the statutory language which must be corrected sooner or later.

The opinion of the court below casually assumes, without reference to the language of 18 U.S.C. § 1343, that that section creates an offense which is made federally prosecutable by an "interstate nexus" that is not part of the offense itself. This is, indeed, a proper if not unavoidable interpretation of the language of some statutes. *See, e.g.*, the Dyer Act, 18 U.S.C. § 2313 (prohibiting receipt of a stolen vehicle which has crossed a state line, but expressly limiting the knowledge required to show guilt to knowledge that the vehicle has "been stolen"); 18 U.S.C. § 1708 (receiving material stolen from the mail; knowledge requirement limited to "knowing the same to have been stolen"), *see United States v. Roglieri*, 700 F.2d 883, 885 (2d Cir. 1983).[5] However,

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5 Other inapposite precedents cited by the Court of Appeals either involve statutes that differ from Section 1343 because they

a comparison of the language of those statutes with 18 U.S.C. § 1343 dramatically illustrates that the casual assumption of the court below is completely unsupported by the language of Section 1343.

The text of Section 1343 makes it as clear as language can make it that the offense created by the statute is the making or causing of an interstate communication. "Whoever," it says, having devised a scheme to defraud, "transmits or causes to be transmitted" an interstate communication "for the purpose of executing" such a scheme, "shall be fined under this title or imprisoned not more than five years, or both." Under this language, it is the state-law crime — the devising of the scheme — that is stated as a sort of pre-condition of the offense, and the making or causing of the interstate communication that is its federal essence. There is no basis here for an inference that Congress meant to make the interstate communication a mere jurisdictional hook, not required to be willfully or intentionally done or caused, or found by a jury to be proved beyond a reasonable doubt. There is also no basis here for an inference that Congress meant to draw upon its constitutional powers to the utmost in order to make substantially all fraud cases subject to federal jurisdiction, regardless of whether they involve some interstate aspect sufficient to justify a finding by the jury that the defendant made or could foresee the making by somebody of an interstate communication. The decision of the court below thus disregards principles of statutory construction that have invariably been followed

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necessarily and by definition involve a federal interest (*see* 18 U.S.C. § 111 concerning assaults on federal officers, interpreted in *United States v. Feola*, 420 U.S. 671, 684 (1975)), or are decisions by the Fourth Circuit following and relying upon (as to statutes other than Section 1343) the Second and Eighth Circuit decisions which are a part of the conflict among the circuits referred to in Part A, above. *United States v. Darby*, 37 F.3d 1059, 1066 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 1826 (1995); *United States v. Le Faivre*, 507 F.2d 1288, 1298 (4th Cir. 1974), *cert. denied*, 420 U.S. 1004 (1975).

by this Court, *United States v. Bass*, 404 U.S. at 347, and should, accordingly, be reversed.

II. The Writ Should Be Granted as to the Issue of Whether an Appellate Court May Affirm a Conviction on a Theory Different from the Theory Submitted to the Jury, Because the Decision Below Conflicts Both with the Decisions of this Court and with the Decisions of Other Courts of Appeals, and Raises Important Issues of Due Process and Proper Appellate Procedure

In affirming the conviction on the theory that only intrastate telephone calls need be foreseeable, the Court of Appeals adopted and relied upon a theory contrary to the theory stated in the instructions to the jury. This action by the Court of Appeals was in conflict with the repeated holdings of this Court that a conviction may not be affirmed on the basis of a theory upon which the jury was not instructed. *Chiarella v. United States*, 445 U.S. 222, 236-37 (1980); *Rewis v. United States*, 401 U.S. 808, 814 (1971); *Dunn v. United States*, 442 U.S. 100, 106-07 (1978); *Pereira v. United States*, 347 U.S. 1, 10 n.* (1954). A companion rule violated by the decision of the Court of Appeals is that a jury instruction is the law of the case, and is the standard by which the sufficiency of the evidence must be determined on appeal. *United States v. Luciano-Mosquera*, 63 F.3d 1142, 1152 (1st Cir. 1995); *United States v. Gomes*, 969 F.2d 1290, 1293-95 (1st Cir. 1992); *United States v. Anguilo*, 897 F.2d 1169, 1196-97 (1st Cir.), *cert. denied*, 489 U.S. 845 (1990); *United States v. Tapio*, 634 F.2d 1092, 1094 (8th Cir. 1980).

The purpose of the two cited rules is to afford the defendant reasonable certainty as to the applicable legal standards so that he can intelligently plan his defense, whether at trial or on appeal. Due process and the Sixth Amendment rights to jury trial and to know the "nature and cause of the accusation" require that an accused be informed of every element as to which he must prepare a defense. *United States v. Lattimore*, 215 F.2d 847, 849 (D.C. Cir. 1954). Due process applies to the appeal as well as to the trial. *Castle v. United States*, 399 F.2d 642, 650 (5th Cir.

1968); *Doyle v. United States*, 366 F.2d 394, 398-99 (9th Cir. 1966). To uphold a conviction on a charge that was neither alleged in the indictment nor presented to the jury offends the most basic notions of due process, and violates the firmly established constitutional principle of a defendant's right to be heard on the specific charges of which he is accused. *Dunn v. United States*, 442 U.S. at 106.

The present case differs superficially from some of the cases cited above in that here the jury returned a verdict in the Government's favor under a standard more demanding than the new legal standard adopted by the Court of Appeals. Thus, under the instructions to the jury, the Government was obliged to prove that the interstate telephone calls alleged in the indictment were foreseeable. Under the standard adopted by the Court of Appeals, the Government need prove only that telephone calls of some kind were foreseeable. Since the jury found guilt under a more demanding standard than the court held was required, and since the defendant had notice that the foreseeability of interstate telephone calls was an issue in the case, is it still unfair for the appellate court to affirm the conviction on a theory not submitted to the jury?

The answer to that question is a resounding yes. It is clear that the jury never rendered a proper verdict on the foreseeability issue, since the record is devoid of evidence on which a conclusion that Lindemann could foresee the making of interstate telephone calls could be based.[6] This conclusion is clear not only

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6 The issue presented under the trial court's instructions was whether three specific interstate communications made by Ward and Burns were foreseeable to Lindemann. Arguably, the evidence failed to show that Lindemann was involved in the plot at all; certainly there was no evidence that he knew Ward or Burns would be involved. What was shown, at most, was that Lindemann spoke to Hulick, the manager of Cellular Farms, about putting down the horse Charisma. The evidence failed to show: (1) that Lindemann knew Hulick would ask anyone for help; (2) that if she did ask for help

from the record but from the Government's virtual abandonment in the Court of Appeals of any effort to sustain the verdict as proper under the standard laid down by the trial court's instructions. Under that standard, Lindemann was entitled to have the verdict set aside and judgment rendered in his favor because of the insufficiency of the evidence presented by the Government at trial. On appeal, however, instead of awarding Lindemann the judgment to which he was entitled, the Court of Appeals accepted the Government's "afterthought theory"[7] and adopted a new, lower standard, then supplied its own "verdict" under that standard and affirmed the conviction.

Similarly, it is no answer to the due process requirement of fair notice that notice was afforded of different, more demanding foreseeability requirements. Where, as here, it is clear that the Government cannot meet the evidentiary requirements imposed by the trial court's instructions, counsel may elect not to introduce evidence that is available but does not seem necessary — such as, for example, the testimony of Hulick or Lindemann. Moreover, when an issue seems already won, counsel may choose to ignore it in arguments to the jury and concentrate on more difficult issues. On appeal, as dramatically illustrated here by the Court of Appeals' observation that Lindemann "does not really dispute" the foreseeability of intrastate telephone calls (see footnote 2, *supra*), counsel may fail to make their position clear on issues they did not know were presented in the case until the appellate court's opinion was published.

As a result of the Government's change of position on appeal and the Court of Appeals' retroactive approval of that position, Lindemann's defense was effectively sandbagged. The

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she would go outside the farm; (3) that if she went outside the farm she would ask Ward (who lived a few miles away in the same state); (4) that if Ward (who had his own farm and staff) became involved he would bring in an outsider; or (5) that if he did bring in an outsider it would be someone from another state.

7 *United States v. Gomes*, 969 F.2d at 1295.

court's decision denied Lindemann both a jury verdict under the standard used to sustain the conviction and the notice required to make an effective defense both at trial and on appeal. The decision thus raises important issues of proper appellate practice and due process on appeal that should be reviewed by this Court.

CONCLUSION

Wherefore, petitioner requests that the Court grant this petition for writ of certiorari.

Dated: September 30, 1996

Respectfully submitted,

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APPENDIX

APPENDIX - A

UNITED STATES of America,
Plaintiff-Appellee,

v.

George LINDEMANN, Jr.,
Defendant-Appellant.

No. 96-1188.

United States Court of Appeals, Seventh Circuit.
Argued April 12, 1996.

Decided June 4, 1996.

Rehearing and Suggestion for Rehearing
En Banc Denied July 1, 1996.

Barry Rand Elden, Chief of Appeals, R. Christopher Cook (argued), Office of U.S. Atty., Crim. Appellate Div., Chicago, IL, for U.S.

Dan K. Webb (argued), Thomas J. Frederick, Todd J. Ehlman, Bruce L. Bower, Winston & Strawn, Chicago, IL, Jay Goldberg, New York City, for George Lindemann, Jr.

Before CUMMINGS, COFFEY and MANION, Circuit Judges.

CUMMINGS, Circuit Judge.

"Charisma," a show horse, died in its stall on the night of December 15, 1990. The insurance company that had issued a policy on Charisma's life concluded that the death was the result of natural causes and paid the $250,000 value of the policy. Subsequently, the Federal Bureau of Investigation uncovered an alleged conspiracy between Tommy Burns and Barney Ward to kill horses for pay, allowing the horses' owners to collect insurance proceeds. Burns gave the FBI information indicating that George Lindemann, Jr. ("Lindemann"), a partial owner of Charisma, had arranged the horse's death in order to gain the pro-

ceeds of its life insurance policy. Lindemann was tried and convicted of three counts of wire fraud in violation of 18 U.S.C. § 1343. He appeals that conviction and we affirm.

I.

The following is a synopsis of Burns' testimony at trial. Ward[1] had arranged for Burns to kill fourteen horses for pay prior to Charisma's death. On December 13, 1990, Ward called Burns in Chicago and told him that he could make a lot of money by coming to New York to kill a horse for a man Ward identified as "Lindemann." Burns then called Ward's travel agent in New York to book a flight from Chicago to White Plains, New York. Burns arrived in White Plains at 10:18 a.m. on December 15, 1990, and made his way by car to Ward's residence in Brewster, New York—"Castle Hill." The trip took him longer than expected because of icy road conditions. Upon his arrival, Ward told him to call "Cellular Farms," the horse farm of the Lindemann family, and to speak to Marion Hulick, Lindemann's horse trainer and a co-defendant in this action. Two sequential calls were then made by Burns to Hulick at Cellular Farms.

Hulick told Burns that "they had a horse which needed to be killed at their farm." One of Ward's employees drove Burns to Cellular Farms at around 4:00 p.m. where he was taken directly to Hulick's apartment. In the apartment, Burns met Gerald Shepard, an acquaintance who was inquiring about a position at Cellular Farms. Outside of Shepard's hearing, Hulick told Burns that the killing had to be completed that day because "George" wanted it done while he was in Asia and because Charisma was scheduled to travel to Florida the next day. Hulick told Burns that the amount of the insurance policy was $250,000 and Burns demanded ten percent of the proceeds in exchange for the killing. Hulick responded that "George" would pay whatever it took.

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1 Ward was a co-defendant in the original indictment, but his trial was severed from the trial of Lindemann and Hulick.

Burns, Hulick and Shepard then drove to a remote area of the farm so that Hulick could point out a back road by which Burns could enter the premises that night. The three then went to the stable area. To indicate which horse was to be killed, Hulick entered the stall of only one horse, whose name plate read "Charisma." Prior to Burns' departure, Hulick assured him that she would see to it that the staff was out that night and that she would lock up the dogs so that his presence would not be detected. Burns then checked into a nearby hotel and purchased electrical cords and other equipment. At about 10:00 p.m. that night, he entered Cellular Farms by way of the back road and electrocuted Charisma in its stall.

Burns' testimony was corroborated through the following testimony and evidence. A colleague of Burns, Harlow Arlie, testified that prior to December 15, 1990, Burns told him that he had arranged a profitable horse killing for "a man in New York who owned a phone corporation." Lindemann's father, George Lindemann, Sr., is a successful businessman in the cellular telephone industry, and Lindemann owns 20 percent of his father's corporation. Weather records confirmed that there were ice storms in the area around Cellular Farms on December 15, 1990. Phone records confirmed that two calls were made from Castle Hill to Cellular Farms at the time identified by Burns. Two of Lindemann's employees confirmed Burns' detailed description of the Cellular Farms premises, including the specifics of a statue in the courtyard and a description of the brass poles containing electrical outlets in each of the horses' stalls. Shepard testified that when Burns arrived at Cellular Farms, Burns and Hulick had a conversation out of his hearing. He also testified that Hulick then drove him and Burns to a remote area of the farm and told Burns, "This is a seldom used road. You can park here and come back." Shepard further confirmed that on the tour of the stables, Hulick entered the stall of only one horse—Charisma. Records confirmed that Lindemann was in Asia from November 23, 1990, to December 22, 1990, and that Charisma was scheduled to travel to Florida on December 16, 1990. Colleen Reed, an employee at Cellular Farms, testified that she was taken out

to dinner by Hulick on the night of December 15, 1990. She testified that this was odd because it broke a strictly enforced Cellular Farms rule requiring someone to remain on the premises at all times. Reed testified that when she pointed out to Hulick that no one would be left to monitor the stables, Hulick brushed this fact aside. Reed then found Charisma dead in its stall the morning of December 16, 1990 and observed blood in its nostrils and manure. Finally, it was generally known at Cellular Farms that both Lyman Whitehead and Molly Ash had ridden Charisma in competitions. However, after Lindemann filed the insurance claim for Charisma's death, he specifically told Reed and another employee to lie to the insurance investigators by telling them that Lindemann and his sister were the only people who had ridden Charisma. Lindemann then told the investigators the same thing.

II.

Lindemann argues that his conviction should be reversed for four reasons. First, he claims that the evidence was insufficient to establish that it was he who ordered Charisma's killing. Second, he argues that even if it was sufficiently established that he ordered the killing, the evidence was still insufficient to prove that the use of interstate wires in furtherance of the scheme to defraud was reasonably foreseeable to him. Third, he argues that the government improperly bolstered Burns' credibility. Finally, he argues that the government engaged in improper conduct during closing argument, depriving him of his right to a fair trial. We address each argument in turn.

A.

The government's case against Lindemann was as follows: (1) Lindemann defrauded his insurance carrier by ordering Hulick to have Charisma killed; (2) Hulick carried out this order by bringing in Ward to aid in hiring a killer; (3) Ward brought in Burns; and (4) Burns admitted that he did the killing. Burns' testimony regarding his conversations with Ward, his meeting with Hulick at Cellular Farms, and his electrocution of Charisma was corroborated by other testimony and evidence. Furthermore,

Lindemann stipulated to Burns' long relationship with Ward regarding the killing of numerous horses for pay. Thus the evidence strongly indicated that a conspiracy to kill Charisma existed, and that it contained the following members: (1) Burns, who did the killing; (2) Ward, who set up the contact between Cellular Farms and Burns; (3) Hulick, who pointed out to Burns the method of entrance to Cellular Farms and which of the horses was Charisma; and (4) some unknown conspiracy member, who ordered the killing and planned to pay Burns for doing it. Lindemann's contention is that the government presented insufficient evidence to prove that he was that unknown member.

Identification of the defendant as the person who committed the crime is certainly an essential element of any offense. *United States v. Alexander*, 48 F.3d 1477, 490 (9th Cir. 1995), *certiorari denied*, ___ U.S. ___, 116 S.Ct. 210, 133 L.Ed.2d 142 (1995). However, in making a challenge to the sufficiency of the evidence, one bears a "heavy burden." *United States v. James*, 923 F.2d 1261, 1267 (7th Cir. 1991). This Court will reverse a conviction for insufficient evidence only if, after reviewing the evidence in a light most favorable to the government, it is determined that no rational trier of fact could have found the defendant guilty beyond a reasonable doubt. *United States v. Brandon*, 50 F.3d 467 (7th Cir. 1995).

The evidence identifying Lindemann as the unknown member rested specifically on the following testimony of Burns: (1) Ward told Burns that he could make a lot of money coming to New York to kill a horse for a man named "Lindemann"; (2) Hulick told Burns that "George" wanted the killing done while he was in Asia; and (3) Hulick told Burns that "George" would pay whatever it took. Lindemann asserts that these statements were improperly admitted into evidence. If he is wrong, these statements clearly constitute sufficient evidence for the jury to conclude that it was indeed Lindemann who ordered the killing. Unfortunately for Lindemann, because he waived this issue by failing to object when the statements were admitted in the district

court,[2] we must review the decision to admit the statements for plain error only.

Lindemann concedes that he did not object to the admission of the statements. He argues that he did not do so because "the statements were admissible to show a conspiracy between certain alleged participants in the fraud scheme." However, he claims that his failure to object does not mean that he abandoned his claim that the statements were *inadmissible* to identify him as a participant in that scheme. Unfortunately, that is exactly what it means. Attempting to draw a distinction between admissibility regarding the conspiracy and admissibility regarding identification does not eliminate the most basic tenet of the law of waiver: If one would like to preserve error regarding the admission of evidence, one must make a specific objection to that evidence at the time when it is offered. *See, e.g., United States v. Maholias,*

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2 Prior to the trial, the government filed a written proffer and motion in limine requesting that the statements be admitted pursuant to Fed. R. Evid. 801(d)(2)(E). The district court then held a hearing on the motion and specifically asked, "[I]s there anything that is in dispute any question about the government's meeting its obligation to show the conspirators and the coconspirators as required by *United States v. Santiago*, [582 F.2d 1128 (7th Cir. 1978)]?" Counsel for Hulick answered in the negative and counsel for Lindemann remained silent. The court then granted the motion. Furthermore, neither Lindemann nor Hulick objected or requested a limiting instruction when the statements were elicited at trial.

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985 F.2d 869, 877 (7th Cir. 1993). we must review the decision to admit the statements for plain error only. *United States v. Olano*, 507 U.S. 725, 732-734, 113 S.Ct. 1770, 1776-1778, 123 L.Ed.2d 508 (1993). Under this standard, Lindemann must prove that there was an error, that it was plain, and that it affected his substantial rights and the fairness, integrity or public reputation of the judicial proceedings as a whole. *United States v. Penny*, 60 F.3d 1257, 1264 (7th Cir. 1995), *certiorari denied*, ___ U.S. ___, 116 S.Ct. 931, 133 L.Ed.2d 858 (1996).

We pause initially to address Lindemann's contention that the statements were inadmissible because they did not satisfy the personal knowledge requirement of Fed. R. Evid. 602.[3] Lindemann contends that pursuant to Rule 602, the government was required to introduce evidence to prove that Ward and Hulick, as the declarants of the statements, had personal knowledge that it was Lindemann who ordered the killing. However, the Advisory Committee Notes to Rule 801(2)(d)(E) specifically refute this contention:

> *No guarantee of trustworthiness is required in the case of an admission.* The freedom which admissions have enjoyed ... from the restrictive influence of the opinion rule *and the rule requiring first-hand knowledge*, when taken with the apparently prevalent satisfaction with the results, calls for generous treatment of this avenue to admissibility. (emphasis added).

Furthermore, every court that has addressed the issue has held that coconspirator statements are not subject to the requirements of Rule 602. *United States v. Saccoccia*, 58 F.3d 754, 782 (1st Cir. 1995) (holding that the personal knowledge requirement of Rule 602 does not apply to coconspirator statements admissible under Rule

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3 Rule 602 states that "[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." Fed. R. Evid. 602.

801(d)(2)(E)), *certiorari denied*, ___ U.S. ___, 116 S. Ct. 1322, 134 L.Ed.2d 474 (1996); *United States v. Goins*, 11 F.3d 441, 443, 444 (4th Cir. 1993) (same), *certiorari denied*, ___ U.S. ___, 114 S.Ct. 2107, 128 L.Ed.2d 668 (1994); *United States v. McLernon*, 746 F.2d 1098, 1106 (6th Cir. 1984) (same); *United States v. Ammar*, 714 F.2d 238, 254 (3d Cir. 1983) (same), *certiorari denied*, 464 U.S. 936, 104 S.Ct. 344 78 L.Ed.2d 311 (1983); *cf. Brookover v. Mary Hitchcock Memorial Hosp.*, 893 F.2d 411, 415-418 (1st Cir. 1990) (personal knowledge requirement does not apply to an admission under Fed. R. Evid. 801(d)(2)(D)). Thus, Rule 602 did not require the government to present specific evidence of Ward's and Hulick's personal knowledge.

With that aside, we turn now to whether it was plain error to admit the statements pursuant to Fed. R. Evid. 801(d)(2)(E). The basis for excluding hearsay evidence is the notion that statements made while not under oath and while not subject to cross-examination are inherently unreliable. However, the Rules except admissions from the hearsay definition because it is disingenuous for a party to claim that a statement that he himself made is unreliable. This justification loses force in conspiracy situations, however, where the declarant is not the party against whom the statement is offered. But two concerns unrelated to reliability favor admission in conspiracy situations. First is the basic agency principle that acts by one conspirator are chargeable against all those who conspired. *Pinkerton v. United States*, 328 U.S. 640, 66 S.Ct. 1180, 90 L.Ed. 1489 (1946). Thus one conspirator's statements are admissible as evidence against the others. The second concern is necessity:

> Conspiracies are secretive; often their aim is to commit destructive crimes (drug dealing, kidnapping, extortion, murder); often they raise social costs and risks more than individual crimes; live testimony by active participants is hard to get. These reasons account for the crime of conspiracy, the leeway given to the government in prosecuting, and the [coconspirator] excep-

> tion itself. Mueller and Kirkpatrick, *Federal Evidence* § 425 (2d ed. 1994).

Because of these concerns, the Federal Rules of Evidence treat coconspirator statements as non-hearsay, despite the fact that the declarant is not the party against whom they are offered. Thus a court may admit such statements if it determines that the declarant and the defendant were involved in an existing conspiracy, and that the statement was made during and in furtherance of that conspiracy. *Bourjaily v. United States*, 483 U.S. 171, 175-176, 107 S.Ct. 2775, 2778-2779, 97 L.Ed.2d 144 (1987). The standard to be applied is a preponderance of the evidence. *Id.* Furthermore, in making its determination, the court may consider all non-privileged evidence, Fed. R. Evid. 104(a) ("[The court] is not bound by the rules of evidence except those with respect to privileges."), including the statements themselves. *Id.* at 181, 107 S.Ct. at 2781-2782. However, to ensure an element of reliability in the statements, courts, have required that some evidence, independent of the statements, exist to corroborate the conspiracy's existence.[4]

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4 Although the Supreme Court expressly declined to decide whether a trial court could rely "solely upon [the declarant's] hearsay statements to determine that a conspiracy had been established by a preponderance of the evidence," *Bourjaily*, 483 U.S. at 181, 107 S.Ct. at 2781, nearly every Circuit Court of Appeals has answered the question in the negative and required some independent evidence to corroborate the conspiracy. *See United States v. Clark*, 18 F.3d 1337, 1340-1341 (6th Cir. 1994), *certiorari denied*, ___ U.S. ___, 115 S.Ct. 152, 130 L.Ed.2d 91 (1994); *United States v. Sepulveda*, 15 F.3d 1161, 1181 (1st Cir. 1993), *certiorari denied*, ___ U.S. ___, 114 S.Ct. 2714, 129 L.Ed.2d 840 (1994); *United States v. Byrom*, 910 F.2d 725 736 (11th Cir. 1990); *United States v. Garbett*, 867 F.2d 1132, 1134 (8th Cir. 1989); *United States v. Gordon*, 844 F.2d 1397, 1402 (9th Cir. 1988); *United States v. Daly*, 842 F.2d 1380, 1386 (2d Cir. 1988), *certiorari denied*, 488 U.S. 821, 109 S. Ct. 66, 102 L.Ed.2d 43 (1988); *United States v. Martinez*, 825 F.2d 1451, 1453 (10th Cir. 1987), *certiorari denied*, 494 U.S. 1059, 110 S.Ct. 1532, 108 L.Ed.2d 771 (1990).

Given these principles, Judge Marovich's determination that the statements at issue were made in furtherance of a conspiracy between Lindemann, Hulick, Ward, and Burns, and thus admissible pursuant to Fed. R. Evid. 801(d)(2)(E), was not plain error. The evidence sufficiently demonstrated that Burns killed Charisma and was involved in a conspiracy with others in doing so: Burns admitted to being in the "horse killing business"; he admitted to killing Charisma for pay; Arlie testified that prior to leaving, Burns mentioned being paid to go kill a horse in New York; and Shepard testified that Burns was at Cellular Farms on December 15, 1990. Furthermore, there was sufficient evidence that the conspiracy involved both Hulick and Ward: Burns testified at length to the specific roles of both Hulick and Ward in the conspiracy; phone records confirm telephone calls from Ward's residence to Cellular Farms at the times indicated by Burns; Shepard corroborated that Hulick and Burns had a secretive conversation on December 15, 1990, and that Hulick pointed out to Burns a seldom used back road that he could use "to come back" that night; and Shepard further corroborated that while they were in the stables, Hulick entered Charisma's stall, and no other.

Finally, there is evidence that the conspiracy involved Lindemann. Most important, of course, are the statements themselves, which involved Ward and Hulick referring specifically to "George" and "Lindemann" as the unknown conspiracy member.[5] But the evidence does not end there. The government offered evidence corroborating many of the facts contained in the statements. *Bourjaily*, 483 U.S. at 180, 107 S.Ct. at 2781 ("[A]

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5 We cannot take seriously Lindemann's argument that the government failed to meet in burden of proving that the "George Lindemann" referred to was not his father, George Lindemann, Sr.: "Even assuming that these were references to 'George Lindemann,' there were at least two George Lindemanns to whom the name could have reasonably referred: George Lindemann, Sr. as well as George Lindemann, Jr." [Def. Br. 24]. Furthermore, Lindemann took no steps to raise this theory of defense below, consistently referring to himself in argument and in stipulations as simply "George Lindemann."

piece of evidence, unreliable in isolation, may become quite probative when corroborated by other evidence."). One of Hulick's statements was that Burns had to kill Charisma on December 15, 1990, because "George want[ed] it done while he [wa]s in Asia," and because Charisma was scheduled to travel to Florida the next day. The government introduced independent evidence proving that Lindemann was in fact in Asia on December 15, 1990, and that he would return a few days later. It also introduced independent evidence that Charisma was scheduled to travel to Florida on December 16, 1990. Proving that particular elements of the statement did in fact occur satisfies the function of the independent evidence requirement: ensuring an element of reliability in the statement as a whole. *Bourjaily*, 483 U.S. at 179-180, 107 S.Ct. at 2781 ("[I]ndividual pieces of evidence, insufficient in themselves to prove a point, may in cumulation prove it."); *see also United States v. Blevins*, 960 F.2d 1252, 1256 (4th Cir. 1992) (admitting coconspirator statements detailing defendant's role in a conspiracy where independent evidence established that the defendant was at a specific location at the time the coconspirator had stated); *United States v. Brown,* 940 F.2d 1090, 1093 (7th Cir. 1991) (same).

In addition, Arlie testified that prior to leaving for New York, Burns told him that he was going to New York to kill a horse for "a man who owned a phone company." The government offered proof that Lindemann owned 20 percent of his father's large cellular phone corporation. The government also introduced evidence that after Charisma's death, Lindemann intentionally lied, and ordered his employees to lie, to insurance investigators so that the insurance company would not be able to apply one of the policy's exceptions. While these actions did take place after Charisma's death, they aid in making it "more likely than not" that Lindemann was involved in the fraud. *See United States v. Testa,* 548 F.2d 847, 852 (9th Cir. 1977) ("Even if a conspiracy has terminated, evidence of subsequent acts may be admitted to elucidate the nature of the prior conspiracy.").

Given the multiple statements referring to "George Lindemann," the evidence corroborating facts contained in the statements, and Burns' corroborated testimony regarding the rest of the conspiracy, Judge Marovich was entitled to conclude that, more likely than not, Ward and Hulick were involved in a conspiracy with Lindemann to kill Charisma. Judge Marovich was also entitled to conclude that the statements were made in furtherance of that conspiracy. Each statement was made to identify for Burns the party who would pay him for the killing. Such identifications facilitated Burns' decision to kill Charisma and were therefore in furtherance of the conspiracy. *See United States v. Nevils*, 897 F.2d 300, 308 (8th Cir. 1990) (naming of coconspirators held to be in furtherance of conspiracy), *certiorari denied*, 498 U.S. 844, 111 S.Ct. 125, 112 L.Ed.2d 93 (1990). Thus Judge Marovich's determination that the statements were admissible pursuant to Fed. R. Evid. 801(d)(2)(E) was not plain error.

B.

Next, Lindemann argues that there was insufficient evidence that he caused the use of interstate wires in furtherance of the conspiracy to defraud the insurance company, and thus insufficient evidence that he violated 18 U.S.C. § 1343. There are two elements to the offense of wire fraud under Section 1343: (1) a scheme to defraud; and (2) the use of a wire communication in furtherance of that scheme. *United States v. Strickland,* 935 F.2d 822, 828 (7th Cir. 1991), *certiorari denied*, 502 U.S. 917, 112 S.Ct. 324, 116 L.Ed.2d 265 (1991). As discussed above, the government introduced sufficient evidence to establish that Lindemann, Hulick, Ward, and Burns were involved in a conspiracy to kill Charisma. It further introduced evidence that the conspiracy members knew that the purpose of the killing was to defraud the insurance company: Burns testified that when he asked Hulick the value of the insurance policy, she stated that it was $250,000 and that Lindemann would pay Burns 10 percent as his share. This evidence was sufficient to establish a scheme to defraud and the first element was met.

For the second element, Lindemann must have caused the use of interstate wires in furtherance of the scheme to defraud. However, he need not have made the calls himself. As a member of a conspiracy, he is criminally responsible for wire communications "caused by other [conspiracy] members, whether or not he knew of or agreed to any specific" communication. *United States v. Wormick*, 709 F.2d 454, 461 (7th Cir. 1983).[6] The government introduced evidence that Burns and Ward made interstate calls in furtherance of the conspiracy: Ward's telephone call from New York to Burns in Illinois to bring him into the conspiracy; Burns' return of that call the same day; and Burns' call from Illinois to Ward's travel agent in New York to arrange his trip to Cellular Farms to do the killing. Lindemann cannot be held criminally responsible for those calls unless he acted with knowledge that the calls would follow in the ordinary course of business of the scheme, or the calls could have been reasonably foreseen by the defendant. *United States v. Brandon*, 50 F.3d at 467.

Viewed in the light most favorable to the government, the evidence indicated that Lindemann ordered Hulick to have Charisma killed while he was in Asia. Whether he had already spoken to Ward on the issue of hiring a killer, or whether Hulick called in Ward herself, it is reasonably foreseeable that Ward would have to make telephone calls to arrange the hiring. Lindemann does not really dispute this. Rather, he argues that the

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6 The government argues that Lindemann was vicariously liable for the calls of Ward and Burns such that Lindemann's conviction could stand as long as the government proved that the calls were foreseeable to either Ward or Burns. This may have been true if the jury was instructed on vicarious liability. However, the government did not argue this theory to the jury. The jury was specifically instructed that the reasonable foreseeability of the calls was an element of each count that had to be proven with respect to Lindemann. Thus the government is precluded from advancing the vicarious liability theory on appeal. *United States v. Manzella*, 791 F.2d 1263, 1267-1269 (7th Cir. 1986).

government did not prove that he could have reasonably foreseen that his actions would result in *interstate* calls. Lindemann has confused what must be proven to satisfy the second element. The government must only prove:

(1) either:

(a) he acted with knowledge that telephone calls would be made in furtherance of the scheme to defraud; or

(b) it was reasonably foreseeable that telephone calls would be made in furtherance of the scheme to defraud; and

(2) that the calls that were actually made in furtherance of that scheme were of an interstate nature.

It need not prove that the interstate nature of the calls was foreseeable. *United States v. Blackmon*, 839 F2d 900, 907 (2d Cir. 1988) (conviction for violation of wire fraud statute does not require knowledge of the interstate nature of the calls made); *United States v. Bryant*, 766 F.2d 370, 375 (8th Cir. 1985) (same), *certiorari denied*, 474 U.S. 1054, 106 S.Ct. 790, 88 L.Ed.2d 768 (1986). This is so because the element of an "interstate nexus" in Section 1343 is included in the statute not because making interstate calls is more "wrong" in a moral sense than making intrastate calls, but because Congress's power over intrastate activities is limited by the Commerce Clause. Whether the defendant knows that his conduct involves an "interstate nexus" adds nothing to the gravity of the offense that he is committing. Thus it has consistently been held that for statutes in which Congress included an "interstate nexus" for the purpose of establishing a basis for its authority, the government must prove that the defendant knew he was involved in the wrongful conduct, but need not prove that the defendant knew the "interstate nexus" of his actions. See *United States v. Feola*, 420 U.S. 671, 685, 95 S.Ct. 1255, 1264, 43 L.Ed.2d 541 (1975) (conspiracy to assault a federal officer, 18 U.S.C. § 111); *United States*

v. Darby, 37 F.3d 1059, 1066 (4th Cir. 1994) (use of interstate wires to threaten individuals, 18 U.S.C. § 875(c)); *United States v. Muza*, 788 F.2d 1309, 1311-1312 (8th Cir. 1986) (arson on building used in interstate activities, 18 U.S.C. § 844(i)); *United States v. Roglieri*, 700 F.2d 883, 885 (2d Cir. 1983) (possession of material stolen from the mail, 18 U.S.C. § 1708); *United States v. LeFaivre*, 507 F.2d 1288, 1298 (4th Cir. 1974) (use of interstate facilities in gambling activity, 18 U.S.C. § 1952), *certiorari denied*, 420 U.S. 1004, 95 S.Ct. 1446, 43 L.Ed.2d 762 (1975); *Overton v. United States*, 405 F.2d 168, 169 (5th Cir. 1968) (receiving a stolen vehicle in interstate commerce, 18 U.S.C. § 2313).

This lacks of a *mens rea* requirement with regard to the "interstate nexus" is in no way unfair. Defendants who use interstate wires in schemes to defraud are not involved in conduct that, other than the interstate aspect of their calls, is legitimate in nature. Thus they cannot claim unfair surprise in finding out that they were violating the law. The only surprise they experience is in learning that not only were they violating state law, they were violating federal law as well. *Feola*, 420 U.S. at 685, 95 S.Ct. at 1264 ("The concept of criminal intent does not extend so far as to require that the actor understand not only the nature of his act but also its consequence for the choice of a judicial forum.").

Thus we reject Lindemann's claim that there was insufficient evidence that he violated 18 U.S.C. § 1343. The government proved each of the required elements of the statute: It introduced sufficient evidence for the jury to conclude that Lindemann was involved in a conspiracy to defraud; it introduced sufficient evidence that it was reasonably foreseeable to Lindemann that telephone calls would be made in furtherance of that scheme; and it introduced sufficient evidence that interstate telephone calls were actually made in furtherance of the scheme. Nothing more was required.

C.

Lindemann next challenges the admission of evidence regarding Burns' cooperation with the government on other cases. During Burns' cross-examination, Lindemann attacked the credibility of his testimony by suggesting that he would not have gotten a plea deal if he hadn't come up with the name of a "big fish" like Lindemann. Naturally, the government wanted to offer evidence to rebut Lindemann's assertion. Specifically, it wanted to explain to the jury that Lindemann's indictment and Burns' cooperation were the result of a much larger investigation involving the killing of 15 horses, including Charisma. Thus the government elicited from Burns the following testimony:

> Q: Now, Mr. Burns, when the federal agents came down to Florida after you were arrested for killing a horse, Streetwise, they asked you a lot of questions about your crimes; is that right?
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> A: Yes, they did.
>
> Q: Were those agents focused on George Lindemann?
>
> A: No, they weren't. They basically focused on Helen Brach.[7]
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> Q: During the course of your cooperation, Mr. Burns, you cooperated against other wealthy people; isn't that right?
>
> A: Oh yeah.
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> Q: And you've cooperated, have you not, Mr. Burns, with respect to other famous equestrians?
>
> A: Yes, I have.
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> * * * * * *

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7 We address the reference to the Helen Brach investigation below in Part D.

Q: Is George Lindemann a big part of your cooperation or a small part of your cooperation?

A: They never treated him like he was a big part.

Q: In fact, Mr. Burns, you told the government about many, many people that you killed horses for. To your knowledge, how many people did you discuss with the government, roughly?

A: 30.

Q: And how many of those people have pleaded guilty?

A: 90 percent of them.

[Tr. 594-595]. Immediately following this testimony, the court instructed the jury as follows:

> This testimony may be considered by you solely for the purpose of understanding the scope of Tom Burns' cooperation with the government. The fact that other subjects in the investigation may have pled guilty must not be considered by you to infer that the defendants are, therefore, guilty of the crimes with which they are charged.

[Tr. 596]. We review the district court's decision to admit this testimony under an abuse of discretion standard. *United States v. Gill*, 58 F.3d 334, 337 (7th Cir. 1995).

Lindemann argues that Burns' testimony was inadmissible because it was essentially "bolstering." "Bolstering" is the practice of offering evidence solely for the purpose of enhancing a witness's credibility before that credibility is attacked. Such evidence is inadmissible because it "has the potential for extending the length of trials enormously, ... asks the jury to take the witness's testimony on faith, ... and may ... reduce the care with which jurors listen for inconsistencies and other signs of falsehood or inaccuracy." *United States v. LeFevour*, 798 F.2d 977,

983 (7th Cir. 1986). Once a witness's credibility has been attacked, however, the non-attacking party is permitted to admit evidence to "rehabilitate" the witness. *United States v. McKinney*, 954 F.2d 471, 478 (7th Cir. 1992), *certiorari denied*, 506 U.S. 1023, 113 S.Ct. 662, 121 L.Ed.2d 587 (1992).

Lindemann's suggestion that Burns falsely implicated him to obtain a plea deal was certainly an attack on the credibility of Burns' testimony. More specifically, it was an attempt to show that Burns had a bias:

> Bias is the relationship between a party and a witness which might lead the witness to slant, unconsciously or otherwise, his testimony in favor of or against a party. Bias may be induced by a witness' like, dislike, or fear of a party, or *by the witness' self-interest*. *United States v. Abel*, 469 U.S. 45, 53, 105 S.Ct. 464, 469-470, 83 L.Ed.2d 450 (1984) (emphasis added).

Bias is one of the five acceptable methods of attacking the credibility of a witness's testimony: (1) attacking the witness's general character for truthfulness; (2) showing that, prior to trial, the witness has made statements inconsistent with his testimony; (3) showing that the witness is biased; (4) showing that the witness has an impaired capacity to perceive, recall, or relate the event about which he is testifying; and (5) contradicting the substance of the witness's testimony. Wright & Gold, *Federal Practice and Procedure* § 6094 (1990). Thus Lindemann was perfectly entitled to suggest his theory that Burns was lying about Lindemann in order to better the parameters of his plea deal. *Abel*, 469 U.S. at 53, 105 S.Ct. at 469-470. However, the direct consequence of the attack was that the government was entitled to introduce evidence to rehabilitate Burns on the issue. *United States v. McKinney*, 954 F.2d at 478.

The Federal Rules of Evidence specifically address the bolstering/rehabilitation aspect of only two of the five attack meth-

ods: Character for truthfulness and prior inconsistent statements.[8] The admissibility of evidence regarding a witness's bias, diminished capacity, and contradictions in his testimony is not specifically addressed by the Rules, and thus admissibility is limited only by the relevance standard of Rule 402. Wright & Gold, *Federal Practice and Procedure* § 6092 (1990). Therefore, because the attack at issue was on Burns' bias, and not on his character for truthfulness in general, Lindemann's contention that the limitations of Rule 608 should have applied is incorrect. Moreover, because bias is not a collateral issue, it was permissible for evidence on this issue to be extrinsic in form. *United States v. Brown*, 547 F.2d 438 (8th Cir. 1977) (extrinsic evidence admissible to rebut evidence of bias); see also *United States v. Beauchamp*, 986 F.2d 1, 4 (1st Cir. 1993); *United States v. Capozzi*, 883 F.2d 608, 615 (8th Cir. 1989), *certiorari denied*, 495 U.S. 918, 110 S.Ct. 1947, 109 L.Ed.2d 310 (1990); *United States v. James*, 609 F.2d 36, 46 (2d Cir. 1979), *certiorari denied*, 445 U.S. 905, 100 S.Ct. 1082, 63 L.Ed.2d 321 (1980).

Here we conclude that the admission of evidence regarding Burns' cooperation in other cases was relevant. The evidence specifically rebutted the allegation that Burns was biased out of self-interest in Lindemann's case: Burns' successful participation in numerous other cases meant that at the time he was negotiating over his plea deal, he had lots of information to use as bargaining

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8 Following the traditional rule against bolstering, Fed. R. Evid. 608 states that "evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked . . . ." Furthermore, Rule 608 provides specific limitations on the admissibility of rehabilitation evidence: Once a witness's character for truthfulness has been attacked, evidence is admissible "in the form of opinion or reputation" (608 (a)) or non-extrinsic evidence elicited on cross-examination (608(b)). Fed. R. Evid. 801(d) (1) (B) contains the bolstering/rehabilitation rule by defining as nonhearsay only those prior consistent statements that are offered "to rebut an express or implied charge" against a witness of "recent fabrication or improper influence or motive."

chips. That fact was relevant under the standards of Fed. R. Evid. 402 because it made less probable the assertion that Burns was lying in Lindemann's case out of self-interest. See *United States v. Lochmondy*, 890 F.2d 817, 821 (6th Cir. 1989); *United States v. Sanchez*, 790 F.2d 1561 (11th Cir. 1986); *United States v. Martinez*, 775 F.2d 31 (2d Cir. 1985); *United States v. Fusco*, 748 F.2d 996 (5th Cir. 1984). Finally, the district court immediately warned the jury that it was not to infer Lindemann's guilt from the fact that other indicted individuals had pleaded guilty. Thus the evidence was used only to assess Burns' credibility, not as evidence of Lindemann's guilt.

In conclusion, because Lindemann attacked the credibility of Burns' testimony by asserting that Burns had a bias in Lindemann's case, the government was permitted to rebut that assertion by introducing evidence of its own. Furthermore, because that evidence was relevant according to Fed. R. Evid. 402, the district court's decision to admit it was not an abuse of discretion.

D.

Finally, Lindemann contends that the government's improper conduct in closing argument deprived him of his right to a fair trial. We apply a two-part test for assessing such allegations. First, we consider the prosecutor's disputed remarks in isolation to determine whether they are improper. If so, we then consider the remarks in the context of the entire record and assess whether they had the effect of denying the defendant a fair trial. *United States v. Johnson-Dix*, 54 F.3d 1295, 1304 (7th Cir. 1995). Lindemann cites numerous prosecution statements as being prejudicial, most of which he did not object to. Only a few of those statements warrant discussion.

First, Lindemann argues that the government made improper closing arguments by referring to facts not in evidence. Specifically, the government stated, "George Lindemann and Marion Hulick were not indicted because they are rich [or] because they are well known in the equestrian industry. They were indicted because information came to the government which it was able to corroborate a hundred different ways." Lindemann

argues that the government should not have been allowed to make this statement because it did not introduce the "hundred different" pieces of evidence to which it was referring.

Considering the prosecution's statements in isolation, it is not clear that they were improper. Lindemann had consistently argued that he was indicted only because of his wealth and social stature. The prosecution was entitled to rebut this assertion by telling the jury that the reason for his indictment had nothing to do with his status, but was because of corroborated evidence. Informing the jury that the government obtains corroborated evidence prior to issuing its indictments is hardly a revelation. Referring to specific pieces of evidence that were not admitted at trial would have been improper. See *United States v. Fearns*, 501 F.2d 486, 489 (7th Cir. 1974). However, the "hundred different ways" comment was not a reference to one hundred individual pieces of evidence, it was just hyperbole. The U.S. Attorney could just as easily have chosen to say a "million different ways." However, even if we were to conclude that the statement was somehow improper, Lindemann has not demonstrated that he was denied a fair trial in the context of the entire record.

Lindemann's next challenge arises out of the same suggestion that Lindemann was only indicted because of his stature. To rebut the suggestion, the government introduced evidence that its investigation had been extremely large in nature and that Lindemann was just one of the many individuals indicted. In eliciting testimony to this effect, it was mentioned in the jury's presence that investigators had originally contacted Burns in reference to the investigation of Helen Brach's disappearance.[9] The district court made the following decision regarding the mention of this other investigation:

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9 Helen Vorhees Brach, widow of one of the Brach candy family and a horse aficionado, disappeared in 1977, resulting in a publicized investigation.

> I have no problem with ... the defense ... indicating that because of [Lindemann's] special stature he is the prize that the government seeks. But, on the other hand, the government has an opportunity to respond to that, it seems in all fairness, and say that this is a more far-ranging investigation than that involving Mr. Lindemann.
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> * * * * *
>
> The name Helen Brach is already before the jury. And, therefore, some direct question about who else was involved in this investigation or who was the primary focus [will be permitted]. If the answer to that is Helen Brach, take the answer and move no further in exploring the answer. And at some time when you think it is appropriate, I am going to instruct the jury that there is no suggestion, none, that either George Lindemann or Marion Hulick were in any way involved with the disappearance of Helen Brach, and that this testimony may only be considered by [the jury] solely for the purpose of understanding the scope of Tom Burns' cooperation with the government. [Tr. 527].

During the rest of the trial, Burns mentioned being contacted regarding the Helen Brach case several times. However, he was never questioned any further on the issue, and the jury was instructed just as the judge stated. Given the court's instruction, the jury was not affected by the mention of the Brach investigation. Thus the statements did not deny Lindemann a fair trial.

Finally, in closing argument, Lindemann's counsel suggested that the government's lack of medical evidence as to Charisma's cause of death supported Lindemann's innocence. In criticizing the alleged lack of evidence, he referred to the government's "power" and "resources," implying that the government could have presented such evidence if it existed. To respond to this suggestion, the prosecution reminded the jury that it was Lindemann, and not the government, who, in opening argument, had promised medical evidence to establish Charisma's

cause of death. The prosecution then made the following statement:

> This is what they told you the evidence would prove. Again, did they present any evidence that the horse died of a cardiac arrhythmia? Don't their resources at least equal those of Peter Cullen, the one-man band who solved the Helen Brach case.

Mr. Cullen was one of the federal investigators who worked on Lindemann's and the other horse-killing cases. The district court immediately struck the prosecutor's last sentence and instructed the jury as follows:

> Ladies and Gentlemen, [the reference of Mr. Cullen was] one of the remarks that I told you to ignore—and I really want to make sure, because it is inappropriate. I don't care, nor should you, who solved the Helen Brach murder. That's not a part of this trial. Whether he is the hero or anybody is the hero is immaterial. It is particularly so since he hasn't even testified in this trial. [Tr. 1757].

> Again, given the district court's immediate and proper instruction to the jury that it was to ignore any references to the Brach case, and Mr. Cullen's involvement specifically, Lindemann has not demonstrated that he was denied a fair trial.

III.

For the foregoing reasons, the decision of the district court is AFFIRMED.

APPENDIX-B

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

July 1, 1996

Before

Hon. WALTER J. CUMMINGS, Circuit Judge

Hon. JOHN L. COFFEY, Circuit Judge

Hon. DANIEL A. MANION, Circuit Judge

UNITED STATES OF AMERICA, Plaintiff-Appellee, No. 96-1188 vs. GEORGE LINDEMANN, JR., Defendant-Appellant.	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 94 CR 483 **George M. Marovich,** Judge

ORDER

On consideration of the petition for rehearing with suggestion for rehearing en banc filed by defendant-appellant on June 18, 1996, all of the judges on the panel have voted to deny a rehearing and no judge in active service has requested a vote on the suggestion for rehearing en banc. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.